No. 93-644

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

HONDA MOTOR CO., LTD; HONDA R&D CO., LTD.;
and AMERICAN HONDA MOTOR CO., INC.,
Petitioners,

v.

KARL L. OBERG,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF *AMICI CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC., THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CHEMICAL MANUFACTURERS ASSOCIATION, DEFENSE RESEARCH INSTITUTE, NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AND OREGON ASSOCIATION OF DEFENSE COUNSEL, IN SUPPORT OF PETITIONERS

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33 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICI CURIAE	1
PRELIMINARY STATEMENT	3
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. DUE PROCESS REQUIRES THAT PUNITIVE DAMAGES VERDICTS BE JUDICIALLY REVIEWED FOR REASONABLENESS	8
II. JUDICIAL REVIEW FOR REASONABLENESS OF A PUNITIVE DAMAGES AWARD REQUIRES THE REVIEWING COURT TO ASCERTAIN WHETHER THE AWARD WAS BASED ON IMPROPER FACTORS AND WHETHER THE AWARD IS WITHIN A RANGE THAT CAN REASONABLY BE SAID TO FURTHER THE LEGITIMATE PURPOSES OF DETERRENCE AND PUNISHMENT	9
A. At the Threshold, Judicial Review Must Ascertain Whether the Punitive Damages Award Resulted From Passion, Prejudice, or Consideration of Improper Factors	9
B. Due Process Requires That Judicial Review for Reasonableness Also Ascertain Whether the Punitive Damages Award Lies Within the Range of Sums That Can Reasonably Be Said to Be Necessary to Achieve the Legitimate Purposes of Deterrence and Punishment	10
C. Judicial Review for Reasonableness Must Be Based on Objective Evidence in the Record	12
1. Evidence presented, and arguments made by the plaintiff's lawyer, at trial	13

TABLE OF CONTENTS—Continued

	Page
2. Jury instructions	21
3. Comparative analysis	22
4. Deterrence and retribution factors	24
CONCLUSION	27

TABLE OF AUTHORITIES

CASES

	Page
Adams v. Murakami, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991)	16
Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. (1988)	10
Bittner v. American Honda Motor Co., 1993 WL 502774 (Wis. Ct. App. Dec. 9, 1993)	16
Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989)	11
City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981)	18
Coker v. Georgia, 433 U.S. 584 (1977)	12
Continental Trend Resources, Inc. v. OXY USA, Inc., 810 F. Supp. 1520 (W.D. Okla. 1992)	26
DeRance v. PaineWebber, Inc., 872 F.2d 1312 (7th Cir. 1989)	24
Dunn v. HOVIC, 1 F.3d 1371 (3d Cir. 1993)	24
General Motors Corp. v. Johnston, 592 So. 2d 1054 (Ala. 1992)	24
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)	11, 21
Giaccio v. Pennsylvania, 382 U.S. 399 (1966)	9
Hammond v. City of Gadsden, 493 So. 2d 1374 (Ala. 1986)	25
Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982)	9-10
International Bhd. of Elec. Workers v. Foust, 442 U.S. 42 (1979)	12
Latham Seed Co. v. Nickerson American Plant Breeders, Inc., 978 F.2d 1493 (8th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S. Ct. 3037 (1993)	25
Mason v. Texaco, Inc., 948 F.2d 1546 (10th Cir. 1991), *cert. denied*, —— U.S. ——, 112 S. Ct. 1941 (1992)	26
Mathews v. Eldridge, 424 U.S. 319 (1976)	23
MGW, Inc. v. Fredericks Development Corp., 12 Cal. App. 4th 244, 6 Cal. Rptr. 2d 888 (1992)	25
Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991)	*passim*

TABLE OF AUTHORITIES—Continued

	Page
Powell v. Texas, 392 U.S. 514 (1968)	13
Robinson v. California, 370 U.S. 660 (1962)	13
Rosenbloom v. Metromedia, Inc., 289 F. Supp. 737 (E.D. Pa. 1968), *rev'd on other grounds*, 415 F.2d 892 (3d Cir. 1969), *aff'd*, 403 U.S. 29 (1971)	12
Rummel v. Estelle, 445 U.S. 263 (1980)	12
Smith v. Wade, 461 U.S. 30 (1983)	12
Solem v. Helm, 463 U.S. 277 (1983)	22
State Farm Mut. Auto Ins. Co. v. Zubiate, 808 S.W.2d 590 (Tex. Ct. App. 1991)	26
St. Louis, I.M. & S.R. Co. v. Williams, 251 U.S. 63 (1919)	9
Twining v. New Jersey, 211 U.S. 78 (1908)	8
2-D's Logging, Inc. v. Weyerhauser Co., 53 Or. App. 677, 632 P.2d 1319, *cert. denied*, 292 Or. 109, 642 P.2d 311 (1981)	12
TXO Production Corp. v. Alliance Resources Corp., —— U.S. ——, 113 S. Ct. 2711 (1993)	*passim*
STATUTES	
O.R.S. 30.925(3) (f)	15
OTHER AUTHORITIES	
Abraham & Jeffries, *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. Legal Studies 415 (1989)	19
Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. 831 (1989)	19
Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 So. Cal. L. Rev. 1 (1982)	24-25
M. Peterson, S. Sarma & M. Shanley, *Punitive Damages: Empirical Findings* (1987)	2
Reporters' Study, American Law Institute, *Enterprise Responsibility for Personal Injury*, Vol. II (1991)	19
Spence, *How to Make a Complex Case Come Alive for a Jury*, 72 A.B.A.J., Apr. 1, 1986 at 62	14

TABLE OF AUTHORITIES—Continued

	Page
Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. 919 (1989)	19
Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 Stan. L. Rev. 838 (1972)	22

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INTEREST OF THE AMICI CURIAE

Amici submit this brief in support of Petitioners to assist the Court in resolving the procedural due process issues presented in this case.* The interest of *Amici* is not in adding to Petitioners' thorough showing that due process requires *some* form of judicial review; rather, *Amici* seek to show what due process standards that review must satisfy, and to urge the Court to enunciate those standards in this case so as to bring a greater level of predictability and fairness to punitive damages proceedings in the various states.

* Consent letters have been filed with the Clerk of this Court.

Amici's interest in this case arises from the fact that, as shown by the brief descriptions of each of them below, their members collectively constitute the very core of commercial activity in the United States, and it is their members and other commercial entities that have suffered directly from the surge of arbitrary, discriminatory, and excessive punitive damages judgments in recent years. *See, e.g.*, M. Peterson, S. Sarma & M. Shanley, *Punitive Damages: Empirical Findings* 53 (1987) (results of empirical study by RAND Institute for Civil Justice "suggest that not only do business defendants have larger punitive awards assessed against them, but they are also likely to pay a greater portion of those awards"). *Amici* therefore have a strong interest in helping the Court to articulate standards of judicial review that are necessary to ensure that punitive damages proceedings comport with due process. As Justice O'Connor stated last term:

> This Court's decision in *Haslip* promised that, even if juries occasionally failed to fulfill their function faithfully, trial and appellate courts would provide meaningful review sufficient to discern impermissible influences and guarantee constitutional results.

TXO Production Corp. v. Alliance Resources Corp., —— U.S. ——, ——, 113 S. Ct. 2711, 2742 (1993) (O'Connor, J., dissenting). *Amici* seek to have that promise of constitutional protection fulfilled.

The Product Liability Advisory Council, Inc., is an association of industrial companies, including Honda North America, Inc., that was formed for the principal purpose of submitting *amicus curiae* briefs in appellate cases involving significant issues affecting the law of product liability.

The Chamber of Commerce of the United States of America is America's largest federation of businesses, representing more than 220,000 companies, several thousand trade and professional associations, and hundreds of state and local Chambers of Commerce.

The Chemical Manufacturers Association is a nonprofit trade association whose member companies produce, market, and use industrial chemicals. Its member companies comprise 90 percent of the production capacity of basic industrial chemicals in the United States.

The Defense Research Institute is the largest national organization of lawyers specializing in the defense of civil litigation. Its total constituency consists of some 19,000 defense trial lawyers through affiliation with the International Association of Defense Counsel, the Federation of Insurance and Corporate Counsel, the Association of Defense Trial Attorneys, and some sixty state and local defense attorney organizations.

The National Association of Manufacturers is an association of approximately 12,500 companies and subsidiaries that together employ 85 percent of all manufacturing workers in the United States and produce more than 80 percent of the nation's manufactured goods.

The Oregon Association of Defense Counsel ("OADC") is a nonprofit association of Oregon attorneys whose practice consists mainly of representing defendants in civil litigation.

PRELIMINARY STATEMENT

The opinion of the Oregon Supreme Court, reported at 316 Or. 263, 851 P.2d 1084, the opinion of the Oregon Court of Appeals, reported at 108 Or. App. 43, 814 P.2d 517, and the record below provide the following facts on which *amici* rely.

This product liability case arises out of injuries incurred by Plaintiff Karl Oberg when the all-terrain vehicle ("ATV") he was attempting to ride up a steep embankment overturned. The ATV had been designed, manufactured, and distributed by Petitioners Honda Motor Co., Ltd., Honda R&D Co., Ltd., and American Honda Motor Co., Inc. (collectively, "Honda").

Oberg sought punitive damages, and the trial court gave the following punitive damages instructions to the jury:

> If you have found that plaintiff is entitled to general damages, you must then consider whether to award punitive damages. Punitive damages may be awarded to the plaintiff in addition to general damages to punish wrongdoers and to discourage wanton misconduct.
>
> In order for plaintiff to recover punitive damages against the defendant[s], the plaintiff must prove by clear and convincing evidence that defendant has shown wanton disregard for the health, safety, and welfare of others.
>
> Clear and convincing evidence is evidence that enables you to find that the truth of the facts asserted is highly probable.
>
> Wanton disregard for the health, safety, and welfare of others is conduct amounting to a particular aggravated deliberate disregard of the rights of others.
>
> If you decide this issue against the defendant[s], you may award punitive damages, although you are not required to do so, because punitive damages are discretionary.
>
> In the exercise of that discretion you shall consider evidence, if any, of the following:
>
> First, the likelihood at the time of the sale that serious harm would arise from defendants' misconduct.
>
> Number two, the degree of the defendants' awareness of that likelihood.
>
> Number three, the duration of misconduct.
>
> Number four, the attitude and conduct of the defendant[s] upon notice of the alleged condition of the vehicle.
>
> Number five, the financial condition of the defendant[s].

> And the amount of punitive damages may not exceed the sum of $5 million.

(Tr. 24:2944.)

The jury awarded compensatory damages of $919,390.39 and punitive damages of $5 million. Because the jury found Oberg 20 percent at fault, the trial court reduced the compensatory award by that percentage and entered a judgment for Oberg in the sum of $5,735,512.31.

Honda moved for judgment notwithstanding the verdict and, in the alternative, for a new trial. The motion asserted, among other points, that the punitive damages award had resulted from procedures that failed to meet due process requirements and was excessive as a matter of law. The trial court denied the motion without stating any reason, either at the hearing or in the written order. (Tr. 13:3063).

Honda appealed, again challenging both the punitive damages procedures and the excessiveness of the punitive damages award. The Oregon Court of Appeals held that the jury instructions "adequately guided the jury during its consideration of defendants' liability for punitive damages." 108 Or. App. at 53, 814 P.2d at 523. The court of appeals also held that Article VII (amended), section 3, of the Oregon Constitution prohibited both it and the trial court from setting aside the verdict as being excessive, and that the same provision limited appellate review to asking only whether there was "any evidence" to support a punitive damages verdict. 108 Or. App. at 55, 814 P.2d at 524. The court of appeals concluded that this combination of jury instructions and appellate review, with no judicial review for excessiveness of the punitive damages award, satisfied the requirements of due process.

Honda appealed to the Oregon Supreme Court, which affirmed. The supreme court concluded that no judicial review for excessiveness, either by the trial court or by

any appellate court, was constitutionally required; rather, it held, the combination of jury instructions and limited appellate review to determine whether there was any evidence to support an award of punitive damages was sufficient to satisfy due process. 316 Or. at 284-85, 851 P.2d at 1096.

SUMMARY OF ARGUMENT

As this Court explicitly recognized in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 15 (1991), one of the fundamental safeguards against arbitrary and excessive punitive damages awards at common law was "review by trial and appellate courts to ensure that [the award] is reasonable." Today, as exemplified in the extreme case of an Oregon law that precludes any judicial review of the reasonableness of a punitive damages award, that fundamental safeguard is in dire need of affirmation as a requirement of due process of law. Because a requirement without content is tantamount to no requirement at all, it is equally important that this Court reaffirm the basic elements of the required review.

At the threshold, judicial review of the reasonableness of a punitive damages award requires the reviewing courts to determine whether the award resulted from passion, prejudice, or consideration of improper factors, such as the defendant's ethnicity, place of citizenship, or other status. Any award based on such factors would be arbitrary or invidiously dicriminatory, not reasonably calculated to promote the legitimate purposes of deterrence and retribution.

But review merely for the absence of reliance on improper factors cannot be equated with review for reasonableness. Accordingly, as indicated in *Haslip*, judicial review for reasonableness also requires the reviewing courts to ascertain whether the punitive damages award being reviewed lies within the range of sums that can reasonably be said to be necessary to achieve the legitimate purposes of deterrence and retribution. This level

of scrutiny is made especially necessary by the skeletal guidance that most jurors receive in instructions that merely mention deterrence and retribution as purposes, yet never define those terms or identify any of their limiting principles.

Moreover the test of reasonableness is an objective test. It therefore must be based on objective evidence in the record which indicates that the award reflects or fails to reflect a reasonably successful effort by the jury to punish within the confines dictated by deterrent and retributive principles. The questions that facilitate such objective review are those that ask whether the evidence and arguments presented to the jury by the plaintiff were of the type that promote legitimate deterrent and retributive principles or, instead, sought consideration of status and other improper factors; whether the jury instructions were merely skeletal or, instead, identified the limiting principles of deterrence and retribution and cautioned the jury against reliance on status and other improper factors; and whether the size of the punitive damages award, combined with the deterrent and retributive force of the compensatory award, is proportionate to the wrong committed when compared to other punishments inflicted for other wrongs in the form of criminal fines, civil penalties, and other punitive damages awards, taking into consideration such factors as the nature of the wrongs, the harm caused, the harm threatened and the probability of its accrual.

Unless this Court both reaffirms that due process requires objective judicial review of the reasonableness of punitive damages awards and outlines for lower courts the types of considerations that must inform that review to ensure that it is objective, lower court opinions will continue to reflect not a consideration of the record evidence that bears on the reasonableness issue, but only conclusions that the courts' subjective consciences were or were not shocked. To the extent that those opinions continue to proliferate, so, too, will defendants continue to be deprived of due process of law.

ARGUMENT

I. DUE PROCESS REQUIRES THAT PUNITIVE DAMAGES VERDICTS BE JUDICIALLY REVIEWED FOR REASONABLENESS

As this Court has recognized for almost a century:

> [C]onsistently with the requirements of due process, no change in ancient procedures can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law, and protect the citizen in his private right, and guard him against the arbitrary action of government.

Twining v. New Jersey, 211 U.S. 78, 101 (1908). Judicial review for the reasonableness of punitive damages awards is just such an "ancient procedure" that guards "against the arbitrary action of government" and that therefore cannot be withheld without violating the requirements of due process.

This Court recently confirmed that judicial review for reasonableness of punitive damages awards has long been a fundamental characteristic of punitive damages proceedings.

> Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. *The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.*

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 15 (1991) (emphasis added). *Accord TXO Prod. Corp. v. Alliance Resources Corp.*, —— U.S. ——, ——, 113 S. Ct. 2711, 2720 (1993) (Stevens, J., Rehnquist, C.J. & Blackmun, J.) ("A general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus."); *id.* at 2727 (Scalia & Thomas, JJ., concurring in the judgment) (" 'procedural due process' requires

judicial review of punitive damages awards for reasonableness"); *cf. id.* at 2731-32 (O'Connor, J., dissenting) (urging objective criteria for judicial review and noting that the Court previously had held an award "wholly disproportionate to the offense and obviously unreasonable" in *St. Louis, I.M. & S.R. Co. v. Williams*, 251 U.S. 63, 66-67 (1919)).

II. JUDICIAL REVIEW FOR REASONABLENESS OF A PUNITIVE DAMAGES AWARD REQUIRES THE REVIEWING COURT TO ASCERTAIN WHETHER THE AWARD WAS BASED ON IMPROPER FACTORS AND WHETHER THE AWARD IS WITHIN A RANGE THAT CAN REASONABLY BE SAID TO FURTHER THE LEGITIMATE PURPOSES OF DETERRENCE AND PUNISHMENT

A. At the Threshold, Judicial Review Must Ascertain Whether the Punitive Damages Award Resulted From Passion, Prejudice, or Consideration of Improper Factors

At a minimum, courts reviewing a punitive damages award must ascertain whether the award resulted from passion, prejudice, or consideration of improper factors, such as the defendant's ethnicity, place of citizenship, or other status. Under any interpretation of the word, no award that fails this threshold scrutiny can be "reasonable" within the meaning of due process. *See TXO*, 113 S. Ct. at 2725 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 2734-42 (O'Connor, White & Souter, JJ., dissenting); *Haslip*, 499 U.S. at 27 (Scalia, J., concurring in the judgment); *id.* at 41 (Kennedy, J., concurring in the judgment); *id.* at 55 (O'Connor, J., dissenting). In particular, if an award were to be based on passion, prejudice, or improper factors, it could not be "rational in light of [the proper] purpose to punish what has occurred and to deter its repetition." *Haslip*, 499 U.S. at 21. Instead, it would be exactly the type of arbitrary or discriminatory punishment against which the due process clause stands as a bulwark. *See, e.g., Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966); *Hoffman*

Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

B. Due Process Requires That Judicial Review for Reasonableness Also Ascertain Whether the Punitive Damages Award Lies Within the Range of Sums That Can Reasonably Be Said to Be Necessary to Achieve the Legitimate Purposes of Deterrence and Punishment

As noted above, under the traditional common-law approach that infuses the general term "due process" with specific content, the jury's award of punitive damages is "reviewed by trial and appellate courts to ensure that it is *reasonable*." *Haslip*, 499 U.S. at 15 (emphasis added). *Accord TXO*, 113 S. Ct. at 2727 (Scalia & Thomas, JJ., concurring in the judgment). Thus, the judicial review required by due process in punitive damages proceedings means more than mere assurance that this form of punishment has not resulted from passion, prejudice, or a consideration of improper factors. *Cf. Haslip*, 499 U.S. at 21 n.10 (Alabama's detailed substantive standards and comparative analysis for evaluating the reasonableness of punitive damages awards "distinguishes Alabama's system from the Vermont and Mississippi schemes about which Justices expressed concern in . . . *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S. Ct. 1645, 100 L. Ed. 2d 62 (1988)," where Mississippi applied only a "passion, bias and prejudice" standard of appellate review.) Specifically, there must be assurance that the jury has exercised its discretion "within reasonable constraints," *Haslip*, 499 U.S. at 20, and in the appellate context this means judicial review that "makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition," *id.* at 21. *See id.* (approving Alabama procedures in part because they included established judicial review criteria "for determining whether a punitive award is reasonably related to the goals of deterrence and retribution"); *id.* at 22 (approving Alabama procedures in part because their appellate review standards "provide for a rational relationship in

determining whether a particular award is greater than reasonably necessary to punish and deter").

Due process requires this careful judicial scrutiny of punitive damages awards for two reasons. First, unlike the case with issues of compensatory damages and liability, juries in many jurisdictions, including the Alabama jury in *Haslip* and the Oregon jury below, are explicitly told that it is within their discretion to decide whether to award punitive damages, and if so, in what amount. *See Haslip*, 499 U.S. at 6 n.1; Tr. 24:2944. Thus, juries are made to feel that they are not as restricted by rules of law in deciding whether, and how severely, to punish as they are in deciding whether, and how substantially, the plaintiff has been harmed. In addition, most juries, including the jury below, are told nothing at all about the limiting principles of deterrence and punisment that must inform their exercise of the discretion they are told they have; they are told nothing at all about punishments that their legislatures have statutorily found appropriate, in the form of criminal fines, civil penalties, or double- and treble-damages provisions, for similar or more heinous wrongdoing; and they either are not told what factors should be considered or, like the jury below, are given a laundry list of "numerous, and sometimes intangible, factors." *TXO*, 113 S. Ct. at 2720 (Stevens, J., Rehnquist, C.J. & Blackmun, J.).

Under these conditions the danger of arbitrary, excessive, or invidiously discriminatory punishment is particularly great. The "skeletal" guidance provided to juries is "scarcely better than no guidance at all," and it creates a need for "longer and harder" judicial review. *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring).

In sum, careful judicial review is required because juries, lacking adequate constraints or guidance, are likely to "assess punitive damages in wholly unpredictable amounts," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), award punitive damages "to punish un-

popular defendants," *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 50 n.14 (1979), and base punitive damages on "caprice and prejudice." *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., Burger, C.J. & Powell, J., dissenting). These are the fundamental dangers against which due process is supposed to protect.

C. Judicial Review for Reasonableness Must Be Based on Objective Evidence in the Record

Judicial review to determine whether a punitive damages award resulted from passion, prejudice, or consideration of improper factors, and whether the award can reasonably be said to be necessary to achieve the legitimate purposes of deterrence and punishment, can and must be based on objective evidence in the record. *See Rummel v. Estelle*, 445 U.S. 263, 274 (1980) ("constitutional judgments should not be, or appear to be, merely the subjective views of individual Justices" (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)); *TXO*, 113 S. Ct. at 2725 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 2735-42 (O'Connor, White & Souter, JJ., dissenting). Otherwise, as one court candidly admitted, courts merely substitute their own subjective notions for those of the juries, and the courts' "reaction is admittedly visceral." *Rosenbloom v. Metromedia, Inc.*, 289 F. Supp. 737, 749 (E.D. Pa. 1968), *rev'd on other grounds*, 415 F.2d 892 (3d Cir. 1969), *aff'd*, 403 U.S. 29 (1971). The result is judicial review that is "an imprecise pattern of subjective judicial reactions mixed with some episodes of deference to jury verdicts." *2-D's Logging, Inc. v. Weyerhauser Co.*, 53 Or. App. 677, 688-89, 632 P.2d 1319, 1326, *cert. denied*, 292 Or. 109, 642 P.2d 311 (1981).

Trial court records can be reviewed for a wide variety of objective evidence that will assist a reviewing court in determining whether a punitive damages award is likely to have resulted from passion, prejudice, or consideration of improper factors and whether the award reasonably furthers the legitimate purposes of deterrence and punishment. In several opinions, Members of this Court already have indicated the nature of much such evidence. It only remains for the Court in this case to give more guidance to the lower courts by collectively describing the principal objective factors that judicial review should encompass. This is not to suggest that due process requires reversal whenever any one such factor exists; rather, it is simply to say that the lower courts need to be apprised of the several objective factors that should be considered in assessing the constitutional reasonableness of a punitive damages award. The objective factors that judicial review should take into account include at least the following.

1. *Evidence presented, and arguments made by the plaintiff's lawyer, at trial.*

First, the reviewing court should examine the evidence presented and arguments made to the jury by the plaintiff's lawyer. If the plaintiff's lawyer and witnesses urged the jury to consider an improper factor, and if a punitive damages award resulted, a reviewing court can reasonably assume that there is some likelihood that the argument had its intended effect. *See, e.g., TXO*, 113 S. Ct. at 2738-39 (O'Connor, White & Souter, JJ. dissenting).

Judicial review should be especially attentive to arguments by plaintiffs' lawyers that invite the jury to focus on some aspect of the defendant's status. *See Powell v. Texas*, 392 U.S. 514, 543 (1968) ("Punishment for a status is particularly obnoxious."); *cf. Robinson v. California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold"). Thus, the plurality in *TXO* intimated that "a state practice of permitting juries to rely on a particular factor, such as the defendant's out-state status, would violate due process" and "would likely be subject to challenge on other grounds as well." *TXO*, 113 S. Ct. at 2720 & n.23 (Stevens, J., Rehnquist, C.J. & Blackmun, J.) In this case, for ex-

ample, the jury was reminded that the manufacturer was a Japanese corporation, and the plaintiff's lawyer described his client in closing argument as "a red-blooded 20 year old American boy." Tr. 13:2807. There can be little doubt as to the intended insinuation, and it has no place in a constitutionally fair proceeding.

Similarly, there is an improper focus on a defendant's status when a plaintiff's lawyer emphasizes that the defendant is a corporation. *Cf. TXO*, 113 S. Ct. at 2737 (O'Connor, White & Souter, JJ., dissenting) ("Corporations are mere abstractions and, as such, are unlikely to be viewed with much sympathy."). One of the most common tactics for modern plaintiffs' lawyers is to focus the jury's attention simultaneously both on the corporate nature of the defendant and on the non-resident status of the defendant by repeatedly asking the jury to "send a message" back to the officers or directors of the corporation at its headquarters in some other state. A similar tactic is to emphasize the corporate defendant's status as an insensate entity. One of the country's most prominent plaintiffs' lawyers argues, for example, that a corporation is

> something that does not care or love or have babies of its own—something that does not even breathe. And this "non-breather," shall we call it, had a special kind of blood—it was green, and it was made of money. It sustained itself on money, large amounts of money. It ate money and craved money, more money. More and more money. It lived for money and dreamed of money and even excreted money. . . . Then one day this corporation, this non-breather, discovered a new way to obtain large amounts of money very easily. Do you know what it did?

Spence, *How to Make a Complex Case Come Alive for a Jury*, 72 A.B.A.J., Apr. 1, 1986 at 62, 66.

Another factor that regularly permeates punitive damages proceedings, that appeals to passion and prejudice, and that does not properly promote deterrence or punishment, is evidence of and arguments based on the corporate defendant's total wealth. This Court has recognized the prejudice that a focus on the defendant's wealth is likely to inject into a trial. In upholding Alabama punitive damages procedures against due process attack in *Haslip*, this Court noted with approval that "[a]ny evidence of Pacific Mutual's wealth was excluded from the trial in accord with Alabama law." 499 U.S. at 19. Thus, the Court emphasized, in Alabama "the fact finder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." 499 U.S. at 22. *See TXO*, 113 S. Ct. at 2723 (Stevens, J., Rehnquist, C.J. & Blackmun, J.); *id.* at 2738 (O'Connor, J., dissenting).

The Oregon law applied below provides an excellent, and disturbing, example of the use of the defendant's wealth in a manner antithetical to the rule endorsed in *Haslip*. Oregon law provides that "[p]unitive damages, if any, *shall* be determined and awarded based upon," among other specified factors, "the financial condition of the defendant . . . ." O.R.S. 30.925(3)(f) (emphasis added). The trial court interpreted "financial condition" to mean net worth, allowed Oberg to introduce evidence of Honda's entire net worth of nearly $5 billion, and then charged the jury that it "shall consider [among other specified factors] the financial condition of the defendant." (Tr. 23:2707.)[1] In addition, the net worth evi-

[1] Except for this crucial failing, the jury instructions in this case would have paralleled those in *Hasilp*. The jury in each case was told that the purposes of punitive damages were deterrence and punishment. Each was told that punitive damages were discretionary. In *Haslip* the jury was told to consider "the character and degree of wrong" and the "necessity of preventing similar wrong," and the jury here was told to consider four factors that essentially paraphrased those three factors. *Compare* 499 U.S. at 6 n.1, *with* Tr. 24:2944.

Here, however, these generalized instructions in this case were not supplemented by the protection provided by searching trial court and appellate court review in *Haslip*. As *Haslip* plainly

dence was not admitted for the narrow purpose of *limiting* the punishment so as to prevent financial ruin. *Compare, e.g., Adams v. Murakami*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991). Instead, it was admitted to *increase* the punishment based on the defendants' status.

By allowing the jury to be told a defendant's wealth for the purpose of provoking greater punishment, Oregon law, as interpreted and applied below, deprives punitive damages defendants of one of the major safeguards recognized in *Haslip*. The "financial condition" evidence that was admitted was not limited to the *relevant* financial information—namely, information about any monetary gain that Honda may have realized and expected to realize by using the design that the jury found defective, rather than the design that Oberg claimed should have been used. *See TXO*, 113 S. Ct. at 2721-22 (Stevens, J., Rehnquist, C.J. & Blackmun, J.). The evidence was not even limited to financial information relevant in any other way to the product line in issue—a three-wheel ATV. Instead, the evidence was the nearly $5 billion net worth of the entire parent company and its subsidiaries. That number, of course, included assets derived from and dedicated to numerous other business activities that the defendants engaged in, such as the manufacture and sale of automobiles, motorcycles, four-wheel ATV models, and other products. That number also, of course, included assets derived from sales of products in states other than Oregon, states in which juries had found the product in issue nondefective under their states' laws, *see, e.g., Bittner v. American Honda Motor Co.*, 1993 WL 502774 (Wis. Ct. App. Dec. 9, 1993), as well as from sales of products in other countries, countries that also did not consider the product in issue defective.

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shows, it was the "full panoply" of jury instructions *and* detailed, substantive judicial review that enabled the punitive award in that case to withstand constitutional scrutiny. 499 U.S. at 23.

Thus, the jury was implicitly instructed to base the severity of punishment in large part on assets derived from the defendants' sales of some product lines that had been judicially found, or at least widely considered, nondefective and societally beneficial in Oregon itself and elsewhere, and of a product that, while deemed defective in Oregon, was sold in other jurisdictions where it had been found nondefective or otherwise sufficiently useful so as not to give rise even to an action for compensatory damages.

This failure to require that punitive damages be limited to an amount required to punish and deter conduct only where it violates applicable legal standards is not unique to this case or to Oregon. It is pervasive, and it has arisen in the decades since modern transportation and mass production techniques made interstate and international shipping of manufactured goods the norm, rather than the exception. *Amici's* members include thousands of entities that sell products in interstate commerce, international commerce, or both. Every time a jury in a forum state is allowed to base the size of a punitive damages award against such an entity on a combination of that one state's tort laws and punitive damages laws and the defendant's sales not only in that state, but in all states and countries with laws under which the product is *not* defective, the forum state is thereby allowed to punish the defendant in part for having *complied* with other jurisdiction's laws and for having produced products that other jurisdictions believe provide net benefits for their citizens. Similarly, in states and countries in which the product may be defective, but not sufficiently so as to allow a punitive damages award, the forum state would be basing the amount of punishment in part on conduct considered not deserving of punishment in the jurisdictions where much of the conduct occurred.

The prejudicial effect of evidence of the net worth of a large organization can hardly be overstated. As this Court observed in explaining why punitive damages

should not be permitted against a municipality, "The unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981). And, as recognized in *TXO*, "the emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident." *TXO*, 113 S. Ct. at 2723 (Stevens, J., Rehnquist, C.J., Blackmun, J. & Kennedy, J.). *See id.* at 2738 (O'Connor, J., dissenting) ("the temptation to transfer wealth from out-of-state corporate defendants to in-state plaintiffs can be quite strong").

That same prejudicial impact is even more likely to attend evidence of the wealth of a company the size of Honda, whose annual income greatly exceeds the income of a vast multitude of municipalities. Jurors who vote to award huge damages against their own municipality are fully aware that they themselves will have to shoulder a share of the taxes needed to pay the judgment, and they may temper their verdict accordingly; but most jurors who vote to award huge sums against a private manufacturer are likely to believe that, unless they buy the product model in issue, they will not incur any of the direct cost of the judgment.[2] Even further, in a case like this one, any jury's inclination to redistribute wealth is likely to be exacerbated by knowledge that the wealth will be redistributed not only from a corporation, and not only from an out-of-state corporation, but from a foreign corporation, to a local citizen.

The unacceptability of these prejudicial effects of net worth evidence is sharpened by the now widely recognized fact that a defendant's net worth is irrelevant to

[2] Of course, to the considerable extent that unpredictable, huge punitive awards against some defendants cause all businesses to increase their insurance, their reserves, and their prices, all consumers, including jurors, indirectly pay for unjustified punitive awards.

the determination of the appropriate punishment under any recognized theory of deterrence or retribution. *See, e.g.*, Abraham & Jeffries, *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. Legal Studies 415 (1989); Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. 831, 870-85 (1989); Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. 919, 950-52 (1989). As succinctly stated by the body of leading legal scholars who, serving as reporters for the American Law Institute's study of the need to amend the Restatement (Second) of Torts, recently filed their findings on this issue:

> In determining the size of the award that is sufficient for [deterrence], what is relevant is not the defendant's *overall* wealth, but rather the profit it realized from the particular tortious activity in question.
>
> * * * *
>
> Use of evidence of the defendant's wealth in calculating punitive damages against organizational defendants therefore cannot be justified even by the rationale of economic deterrence, let alone of retributive punishment. Given that the wealth factor imposes a considerable burden on the litigation process and occasionally prejudices the defendant's right to a fair trial of the underlying liability claims, we recommend that evidence of the wealth of the defendant no longer be admissible in assessing punitive damages for enterprise torts.

Reporters' Study, American Law Institute, *Enterprise Responsibility for Personal Injury*, Vol. II, at 254-55 (1991).[3]

[3] In this case, the trial court's treatment of Honda's net worth improperly prejudiced the jury in yet another way—namely, the court's instructions invited the jury to take Honda's wealth into account in deciding not only the amount of punishment, but whether to punish at all. The trial court told the jury:

> If you decide this issue [the existence *vel non* of wanton disregard for the health, safety, and welfare of others] against

In sum, the jury proceedings below, unlike those in *Haslip*, did not ensure that "the fact finder must be guided by more than the defendant's net worth." *Haslip*, 499 U.S. at 22. Instead, the jury instructions and evidence below *required* the fact finder to be guided in large part by the defendants' net worth, and this was done even though that number resulted from the defendants' diversified operations, many of which were unrelated to the product found defective in this case. Regardless of whether that alone made the punitive damages award "exceed an amount that will accomplish society's goals of punishment and deterrence," *Haslip*, 499 U.S. at 21, it certainly deprived the defendants of a safeguard that this Court in *Haslip* considered important. And it certainly put before the jury evidence that was both prejudicial and irrelevant to the legitimate purposes of punitive damages.

Accordingly, this Court should make clear that the judicial review for reasonableness required by due process should include review sufficient to ensure that any financial information admitted in a punitive damages proceeding has been reasonably limited to financial evidence that is truly relevant to deterrence and punishment—namely, evidence of the gain, if any, that the defendant realized or expected to realize by engaging in the challenged conduct. In a product liability context, this is the profit that the defendant realized or expected to realize by choosing

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the defendant[s], you may award punitive damages, although you are not required to do so, because punitive damages are discretionary.

In the exercise of that discretion you shall consider evidence, if any, of the following:

* * * *

Number five, the financial condition of the defendant[s].

Tr. 24:2944 (emphasis added).) The "that discretion" referred to is the only discretion mentioned earlier in the instructions—namely, the discretion to award or not to award any punitive damages. This further demonstrates the risks that arise when wealth is introduced into and made a focal point of punitive damages proceedings.

the challenged design or warning in lieu of the alternative design or warning advocated by the plaintiff.

In addition, because the challenged conduct may be deemed tortious in the forum state and yet be considered by other countries or states to provide a net benefit to their citizens and to be not tortious, the profit evidence in a trial in one state should be limited to the profit derived from sales in that state and others in which the product has been found defective. Other states' and other countries' own public policies would be undermined if punitive damages awards in the forum state were used to deter sales in those other states and countries of products that those states and countries approve for their own citizens, either by some form of certification or licensure or by maintaining a tort system under which the product in question is not deemed defective or otherwise actionable. Principles of fundamental fairness, deterrence, and punishment, as well as comity, permit no other rule.

2. *Jury instructions.*

Objective evidence for judicial review of the reasonableness of a punitive damages award also includes the instructions given to the jury. If the jury is not even told the legitimate purposes of punitive damages, the limiting principles dictated by those purposes, and that the award must not exceed that which is necessary to serve those purposes, it is extraordinarily unlikely that the jury will somehow have divined and scrupulously adhered to those purposes, those limiting principles, and that required maximum. It therefore is equally unlikely that the award will be one that is "reasonably related to the goals of deterrence and retribution." *Haslip*, 499 U.S. at 21. *See Gertz*, 418 U.S. at 350 ("In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the act and harm caused.").

Similarly, if the jury was not instructed that the size of a punitive damages award may not be based on the

defendant's corporate nature, out-of-state or foreign citizenship, or other status, the reviewing court has little reason to be assured that those improper factors did not influence the punitive damages verdict. Assurance would be even less likely if such instructions were not given *and* the plaintiff's lawyer invited the jury to focus on one or more improper status factors.

In *Haslip* this Court recognized the due process importance of the interplay between jury instructions and judicial review. The jury instructions there were limited, causing the Court to emphasize that Alabama provided *both* "meaningful and adequate review by the trial court," *Haslip*, 499 U.S. at 20, *and* thorough appellate review based on "comparative analysis" and "detailed substantive standards," *id.* at 21.

3. *Comparative analysis.*

Another source for objective judicial review is a comparison of the punitive damages award in issue to other punitive damages awards, criminal fines for similar and dissimilar conduct, civil penalties for similar and dissimilar conduct, and statutory provisions for double or treble damages for similar conduct. *See TXO*, 113 S. Ct. at 2720 (Stevens, J., Rehnquist, C.J., & Blackmun, J.) (comparative analysis "might, in a given case, be one of many relevant considerations"); *id.* at 2732-33 (O'Connor, J., dissenting) (comparative analysis "can give us some idea of the limits on retribution"). This is especially important because most juries are allowed to make no such comparison, even though comparisons of acts and corresponding punishments are the very essence of the proportionality that both deterrence principles and retributive principles require. *See, e.g., Solem v. Helm*, 463 U.S. 277 (1983); Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 Stan. L. Rev. 838, 845-57 (1972).

In arriving at an award in a particular case, most juries have no other experience against which to measure their decisions. Unlike a court, which can evaluate the

award and the conduct giving rise to it in the context of reported other awards, other awards rendered in the same courthouse, criminal fines imposed by the same court, and statutory fines and penalties, a jury convened to hear one case cannot have a similar perspective. Thus, a jury does not take into account the relationship of the award in the case before it to the awards in other cases, to criminal fines imposed in other cases, or to statutory provisions for fines and civil penalties. Unlike courts, juries cannot measure the punishment in one case against that in other cases in order to ensure that a particular defendant is not being singled out for disparate treatment and subjected to punishment that is out of line with punishments in other cases.

Providing for judicial review of punitive damages awards by a jury does not merely add another decision-maker to consider the same factors as those which the jury considered. Instead, it is a means of making possible an objective mode of analysis—comparison to other awards and judgments, and to statutes—that is critical to an objective determination of reasonableness, that is absolutely necessary to any attempt to achieve proportionality, and yet that juries do not consider. Thus, this form of review contributes significantly to more consistent and equitable results. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (degree and type of procedural protection that is due is dependent, *inter alia*, upon the risk of erroneous deprivation of such interest through the procedures used and probable value of additional or substitute safeguards).

Moreover, this type of judicial review is part of the process that traditionally has been provided under the various states' judicial systems. In *Haslip* this Court cited with approval the "comparative analysis" applied by Alabama reviewing courts in upholding the constitutionality of the Alabama punitive damages procedure. 499 U.S. at 21-22. Many courts have cited with approval precisely such a comparative analysis as the justification for grant-

ing remittitur of punitive damages awards. *See, e.g., Dunn v. HOVIC*, 1 F.3d 1371, 1391 (3d Cir. 1993) (reducing a $25 million punitive damages award to $1 million because, *inter alia*, the award "greatly exceeds the level of punitive damages awarded in other cases"); *DeRance v. PaineWebber, Inc.*, 872 F.2d 1312, 1329 (7th Cir. 1989) (reducing a $20 million punitive damages award to $7 million because "when contrasted to the punitive damages awards in analogous settings, the $20 million punitive damages award against PaineWebber is significantly excessive"); *General Motors Corp. v. Johnston*, 592 So. 2d 1054, 1063-64 (Ala. 1992) (reducing $15 million punitive damages award in products liability wrongful death case to $7.5 million under Alabama's comparative analysis). The frequency with which reviewing courts have found punitive damages awards excessive under a comparative review suggests the importance of such an analysis in assuring that litigants are treated with consistency and fundamental fairness.

4. *Deterrence and retribution factors.*

The reviewing court also can objectively compare the size of the punitive damages award with the harm caused by the defendant's conduct and the potential harm that the conduct might have caused (although rational analysis quite clearly requires that the probability of such potential harm also be taken into account). *TXO*, 113 S. Ct. at 3721-22 (Stevens, J., Rehnquist, C.J. & Blackmun, J.); *id.* at 2725 (Kennedy, J. concurring in part and concurring in the judgment); *id.* at 2729-31 (O'Connor, J., dissenting). The reviewing court also can examine the nature of the wrongful activity in which the defendant allegedly engaged. *Id.* at 2726 (Kennedy, J., concurring in part and concurring in the judgment). If, for example, the conduct consisted of fraud that greatly increased the likelihood of the defendant's successfully realizing an illegal gain, a substantial punitive damages award might be appropriate. *See, e.g., Ellis, Fairness and*

Efficiency in the Law of Punitive Damages, 56 So. Cal. L. Rev. 1, 20-33 (1982).

In *Haslip* this Court upheld Alabama's punitive damages procedures against due process attack in part because Alabama had specified similar factors to be considered on judicial review, including (1) the "culpability of the defendant's conduct," (2) the "desirability of discouraging others from similar conduct," (3) the "impact upon the parties," and (4) "other factors, such as the impact on innocent third parties." 499 U.S. at 20 (quoting *Hammond v. City of Gadsden*, 493 So. 2d 1374, 1379 (Ala. 1986)). Those, too, are objective factors that can and should be examined in a determination of the constitutional reasonableness of a punitive damages award.

Unfortunately, many lower courts have ignored *Haslip*'s mandate for detailed and objective judicial review based on factors such as those described above. In *MGW, Inc. v. Fredricks Development Corp.*, 12 Cal. App. 4th 244, 254-55, 6 Cal. Rptr. 2d 888 (1992), for example, the California Court of Appeal held that trial court review of punitive damage verdicts could be omitted altogether. The court also determined that the California standards for appellate review of punitive damage awards complied with *Haslip*, even though in California "a punitive damages award will be set aside only when it is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice." *Id.* at 103 (internal quotation marks omitted). Similarly, in *Latham Seed Co. v. Nickerson American Plant Breeders, Inc.*, 978 F.2d 1493 (8th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S. Ct. 3037 (1993), the Eighth Circuit held that the Iowa standard of review, which permits reversal of punitive damages awards "only if it is a plain injustice or a monstrous or shocking result," comports with the *Haslip* requirements for judicial review. 978 F.2d at 1499-1501.

Even those courts that have remitted punitive damage awards have done so generally with little regard to the

Haslip post-verdict review requirements. For example, in *Mason v. Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991), *cert. denied*, —— U.S. ——, 112 S. Ct. 1941 (1992), the Tenth Circuit reduced a punitive damage award from $25,000,000 to $12,500,000, finding simply that this award was "so excessive as to shock our judicial conscience," *id.*, at 1561, but not discussing any of the factors considered in arriving at this decision or explaining how the $12,500,000 remitted award was less shocking or more justifiable than the jury's original verdict. *See also State Farm Mut. Auto Ins. Co. v. Zubiate*, 808 S.W.2d 590, 605 (Tex. Ct. App. 1991) ("Is the evidence factually sufficient to support the trial court's judgment upholding the jury award of $15 million in punitive damages against Appellant? Our answer is no, but why? *Because it just is.*") (emphasis in original).

Lower courts are engaging in a post-verdict review process bearing little resemblance to the process approved by this Court in *Haslip*. Awards are affirmed based upon the judges' highly subjective notions of what constitutes good domestic, and sometimes even foreign, policy. For example, one trial court in a tortious interference action arising from a domestic commercial contract dispute recently affirmed an award on the grounds that, *inter alia*, "[the defendant's] conduct incrementally damages the United States in its present struggle to remain a global economic power." *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 810 F. Supp. 1520, 1530 (W.D. Okla. 1992).

In sum, *Haslip* and *TXO* make clear that due process requires judicial review for reasonableness of punitive damages awards. Review in the lower courts, however, remains largely subjective and limited. This case presents the extreme: no judicial review at all of the size of the award. As a result, punitive damages awards continue to "run wild." *Haslip*, 499 U.S. at 18. This Court should make clear that judicial review must be for reasonableness and must be objective, taking into consideration the several objective factors described above.

CONCLUSION

The judgment below should be reversed, and the case should be remanded for redetermination of punitive damages in accordance with guidelines prescribed by this Court.

Respectfully submitted,

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